EUROPEAN COMMISSION

Brussels, 14.5.2013
C(2013) 2844 *final*

Dear President,

The Commission would like to thank the Senato della Repubblica for its Reasoned Opinion on the proposal for a Directive of the European Parliament and of the Council on the award of concession contracts {COM(2011) 897 final} and apologises for the delay in replying.

The main objective of the proposal is to ensure legal certainty for contracting authorities and bidders. This is not the case under the current legal framework, which is incomplete and subject to divergent interpretations. Such a situation results, on the one hand, in a lack of appropriate judicial guarantees for both contracting authorities and bidders, and on the other hand, in barriers to market entry and an uneven playing field for economic operators.

The analysis of the national provisions on concessions showed that the applicable framework, more specifically on service concessions, is fragmented and incomplete. The impact assessment confirmed that the lack of clear and stable rules contributes to the low uptake of concessions. The consultation of stakeholders performed by the Commission in the context of the preparation of the proposal also proved the existence of many direct awards, which is the most serious infringement of the principles of transparency and equal treatment, and demonstrated that the access to the concessions market is restricted.

The analysis carried out by the Commission further confirmed that Member States have not uniformly interpreted or sufficiently implemented the relevant Treaty principles of transparency, equal treatment and non-discrimination. The ensuing lack of legal certainty and foreclosure of markets is unlikely to be eliminated without intervention at the appropriate level. Even if Member States were to take legislative action at national level to establish a framework based on the Treaty principles, two problems would remain unsolved: the risk of legal uncertainty flowing from possibly diverging interpretations of those principles under national law, and the risk of wide disparities among legislations in different Member States, resulting from the lack of clarity in applicable EU standards.

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The case law of the Court of Justice of the EU is not sufficient to provide the required legal certainty for contracting authorities and economic operators in their day-to-day activities. To date, the Court has rendered 26 judgments on concessions, 18 of which concerned the very definition of such contracts. This case law is not exhaustive and can even appear at times contradictory[1]*. The precise content of the obligations of transparency and non-discrimination arising from the Treaty remains unclear, and in any case, the case law does not specify the concrete procedural requirements for respecting the principle of equal treatment. It is the Commission's opinion that the Court rulings cannot fully remedy the absence of comprehensive secondary legislation.*

As to the specific points you raise, the Commission proposal fully respects the principle of autonomy of municipal and local self-government, as well as the particular importance of services of general economic interest (SGEIs), as recognised by the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

Services concessions may concern the provision of SGEIs. The proposal would under no circumstances result in the forced privatisation of any SGEI sector, and public authorities would remain free to either pursue such activities themselves (i.e. by using their own resources), confer them to an in-house entity or, alternatively, assign them to a third party if they so decide. This decision would remain with them.

In fact, the proposal strengthens the autonomy of public authorities by explicitly including provisions relating to public-public co-operation, providing legal certainty as to types of public cooperation falling outside the scope of public procurement.

It is only in cases where public authorities take a decision to externalise the provision of a service that the Directive would have to be respected, and only with regard to concession contracts advertised after its entry into force.

As to the subject matter of such concession contracts, the Directive would have no impact on the freedom of the competent authority to define the characteristics of the service to be provided, (i.e. the level of quality, fees, etc.). Therefore, the proposed Directive would not restrict the autonomy of these authorities to carry out the public tasks in the manner they consider most appropriate to meet the specific needs of the users.

The impact assessment of the proposed Directive concluded that new rules would not entail a disproportionate administrative burden. The proposal does not seek to harmonise the rules on the award of concessions, but aims to render fundamental Treaty principles clear and unambiguous.

a) *The obligation to publish a concession notice in the Official Journal of the EU (OJEU) would only concern works or services concessions with an estimated value of over 5 million euro. This proposed requirement clarifies the contents of the transparency principle and is expected to reduce the number of direct awards as well as contribute to better information on concession contracts.*

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[1] *E.g. Court's decisions in the Oymanns (C-300/07) and Eurawasser (C-206/08) cases.*

b) *Proposed rules on selection and award criteria on the one hand, as well as provisions on technical specifications on the other, respectively seek to ensure the equal treatment of all candidates and tenderers, as well as to prevent distortions to the free movement of goods and services. These objectives are not adequately addressed by the currently applicable framework for works concessions in the public sector.*

The delegation of powers referred to in Article 46 of the proposal has a very narrow scope and is aimed at allowing the updating of certain aspects of the proposed rules without launching a formal review of the Directive. In any event that delegation may be revoked at any time by the European Parliament or by the Council.

The Commission hopes that these clarifications address the observations made by the Senato and looks forward to continuing our political dialogue in the future.

Yours faithfully,

Maroš Šefčovič
Vice-President